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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JAVIER ENRIQUEZ JIMENEZ, Defendant and Appellant.	2d Crim. No. B215071 (Super. Ct. No. 1286536) (Santa Barbara County)

Javier Enriquez Jiminez was convicted by jury of dissuading a witness by force or threat, (Pen. Code § 136.1, subd. (c)(1))[1], assault with personal use of a deadly weapon likely to produce great bodily harm (ADW; § 245, subd. (a)(1), and misdemeanor assault and battery. (§§ 240, 242.) The trial vacated the misdemeanor conviction and sentenced appellant to six years state prison. Appellant appeals, citing instructional and sentencing errors. We modify the judgment to impose a $20 court security fee on each of the three convictions (former § 1465.8, subd. (a)(1)), and affirm the judgment as modified.

Facts

Viewed in the light most favorable to the judgment, the evidence shows that appellant assaulted his estranged wife, Jane Doe, on November 11, 2009 with a knife

[1] All statutory references are to the Penal Code.

and threatened to kill Doe's mother if Doe reported the crime. Doe was 37 weeks pregnant with appellant's child and had just been released from the hospital for pregnancy complications.

Appellant stopped by to visit and grabbed Doe's breast. Doe told him "No" and moved his hand away. Annoyed, appellant retrieved a butcher knife from the kitchen. Holding the knife to his throat, appellant threatened to commit suicide. He had made a similar threat on a prior occasion. Doe pled with appellant to cease.

Appellant put the knife down, pulled Doe off the couch by the hair, and forced her to orally copulate him.[2] After Doe spit the semen into a Kleenex, appellant asked "What did I just do to you?" Sobbing, Doe said that appellant had raped her.

Appellant shoved the knife in Doe's hand and said "Forgive me for what I am going to do to you." Doe pled with appellant not to kill her. Appellant put his hands over Doe's hand, positioned the knife in front of Doe's pregnant belly as if to stab the fetus, and threw the knife on a coffee table. Appellant then threatened to kill Doe's mother if Doe told anybody about the incident. Doe feared that appellant would carry out the threat.

Appellant was arrested outside his house and was interviewed by a detective. He wrote an apology letter to Doe that said "I put my penis in her mouth with her not want[ing it]. " Eleven months later, appellant wrote a letter to Doe's mom that said, "forgive me for hurting your daughter emotionally but I was hurt and lost myself."

Evidence was received that appellant engaged in prior acts of domestic violence in which he threatened to kill himself with a piece of glass, threatened to cut his throat with a knife in front of Doe's children, and threatened to make life miserable for Doe if she left him. Appellant also assaulted Sabrina Alaniz in 2002 by choking her and holding a kitchen knife to her stomach.

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[2] Appellant was charged with forcible oral copulation (count 1; § 288a, subd. (c)(2)) but convicted of misdemeanor assault and battery, lesser offenses. (§§ 240, 242.) The jury returned a not guilty verdict on a criminal threats count (count 4; § 422).

Dissuading A Witness

Appellant argues that the trial court erred in giving CALCRIM 2622 which sets forth the elements for intimidating a witness by force or threat. (§ 136.1, subd. (c)(1.) Appellant contends that the instruction should have been modified to state that the force or threat must be in conjunction with the act of dissuading a witness. Appellant waived the error by not objecting and is precluded from arguing that the instruction should have been amplified or amended. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.)

Waiver, aside, there was no instructional error. CALCRIM 2622 stated in relevant part: "The defendant is charged in Count 2 with intimidating a witness. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant maliciously tried to prevent or discourage Jane Doe from making a report that she was a victim of a crime to law enforcement officers; [¶] 2. Jane Doe was a crime victim; [¶] 3. The defendant knew he was trying to prevent or discourage Jane Doe from making a report that she was a victim of a crime to law enforcement officers and intended to so. AND [¶] 4. The defendant used force or threatened, either directly or indirectly, to use force or violence on the person or property of Jane Doe or any other person."

Appellant argues that the instruction permitted the jury to find that the attempt to dissuade was coupled with the use of force or threat of force at an earlier, different time. CALCRIM 2622, however, tracks section 136.1, subdivision (c)(1) which provides that the act must be "accompanied by force or by an express or implied threat of force or violence, upon the witness." The jury was instructed that the prosecution had to prove that appellant acted with malice, that appellant "knew" he was trying to discourage Doe from reporting the crime, that appellant "intended to do so," and that appellant used force or threatened to use force or violence on Doe or any other person. Reading the instruction as a whole, which uses a capital "AND" to join the statutory elements, the jury was told that the act of dissuading Doe had to be accompanied with force or threat of force. Amending the instruction to add the words "in conjunction with" would be

cumulative, redundant, and confusing. (See e.g., *People v. Wright* (1988) 45 Cal.3d 1126, 1153-1154 [proposed cautionary instruction was redundant and confusing].)

CALCRIM 2622 must also be read in the context of the other instructions which state that dissuading a witness by force or threat requires "the union, or joint operation, of act and intent." (CALCRIM 252.) Assuming that CALCRIM 2622 was vague about whether the force or threat had to be contemporaneous with the attempt to dissuade, the "joint operation of act and intent" instruction (CALCRIM 252) cleared it up. " ' "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." ' [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.)[3]

Misdemeanor Dissuading A Witness

In his reply brief, appellant argues that the trial court erred in not sua sponte instructing on misdemeanor dissuasion of a witness as a lesser included offense to section 136.1, subdivision (c). Appellant did not raise the issue in his opening brief and is precluded from arguing it now. (*People v. Peevy* (1998) 17 Cal.4th 1184, 1206; *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4.) This aside, the argument fails because there is no evidence of witness dissuasion without force, i.e., misdemeanor witness dissuasion and therefore, there was no duty to instruct thereon. (E.g., *People v. Sedeno* (1974 10 Cal.3d 703, 715.)

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[3] Appellant claims that the instructional error was prejudicial because the jury returned a not guilty verdict on count 4 for criminal threats (§ 422). We reject the argument. In count 4, the jury was instructed that the prosecution had to prove that the threat communicated "the immediate prospect that the threat would be carried out," and "that the threat actually caused Jane Doe to be in sustained fear for her own safety or the safety of her immediate family." (CALCRIM 1300.) Count 2, dissuading a witness, does not require proof of Doe's state of mind, i.e., that the threat actually caused sustained fear and that Doe's fear was reasonable. (§ 136.1, subd. (c)(1).) The trial court, in denying a motion for new trial, found that section 422, unlike section 136.1, subdivision (c)(1), requires the threat to "be immediate and not sometime into the future. . . . [I]t seems logical that a jury could conclude that it wasn't immediate enough to reach that level of requirement under [section] 422."

Citing CALCRIM 2633, appellant claims that section 136.1, subdivision (c)(1) is a "sentencing factor" or enhancement that increases the punishment. We do not agree. This would make the enhancement allegation (i.e., the use of force or threat to dissuade a witness) a greater offense and render section 136.1, subdivision (a) or (b) (i.e., dissuading a witness without force or threat) a lesser offense. "[E]ven if California could constitutionally consider enhancement allegations as part of the accusatory pleading for the purpose of defining lesser included offenses, we see no reason to adopt that course. Not only is the weight of authority against it, but the result would be to confuse the criminal trial." (*People v. Wolcott* (1983) 34 Cal.3d 92, 101.)

Appellant alternatively argues that the trial court should have used a special verdict form requiring the jury to find, as an aggravating factor, that appellant used force or threats to dissuade a witness.[4] The jury returned a verdict which stated: "We the jury . . . hereby find the defendant . . . GUILTY of the crime of DISSUADING A WITNESS BY FORCE OR THREAT, a violation of section 136.1(c)(1) of the Penal Code, a Felony, as charged in Count 2 of the information." Appellant did not object to the verdict form or request that it be modified.

Consecutive Sentences

Appellant asserts that the trial court erred in imposing consecutive three year sentences on count 2 for dissuading a witness by force or threat and count 3 for ADW. "Section 669 grants the trial court broad discretion to impose consecutive sentences when a person is convicted of two or more crimes. [Citations.]" (*People v. Shaw* (2004) 122 Cal.App.4th 453, 458.)

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[4] The CALCRIM 2622 Bench Notes state in pertinent part: "I[f] the defendant is charged under Penal Code section 131.6(c), then the . . . court must provide the jury with a verdict form on which the jury will indicate if the prosecution has proved the sentencing factor alleged. If the jury finds that this allegation has not been proved, then the offense should be set at the level of the lesser offense." (2 CALCRIM 2622 (Fall 2009 ed.), p. 490.)

Appellant claims the offenses were so close in time that it indicates a single period of aberrant behavior warranting a concurrent sentence. That was the probation department recommendation.

The trial court stated: "I disagree with probation [on] their determination that this was one course of conduct. It does require consecutive sentencing . . . ."

Substantial evidence supported the finding that the offenses had different objectives and were predominantly independent of each other. (Cal. Rules of Ct, rule 4.425, subd. (a)(1); see *People v. Oseguera* (1993) 20 Cal.App.4th 290, 294 [consecutive sentence based on finding that offenses were 'predominately independent"].) Appellant assaulted Doe with the knife and threw the knife on the table, ending the assault. Appellant had the opportunity to reflect before committing the next crime of dissuading a witness which had a different criminal objective. (See e.g., *People v. Trotter* (1992) 7 Cal.App.4th 363, 366-367 [consecutive sentences for two assaults on same victim occurring a minute apart during police pursuit].)

Appellant argues that the trial court failed to adequately state its reasons to impose a consecutive sentence (§ 1170, subd. (c)) but appellant forfeited the claim by not objecting. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) Waiver aside, it is not reasonably probable that appellant would obtain a more favorable sentence if the mater were remanded. (*People v. Champion* (1995) 9 Cal.4th 879, 934.)

The probation report listed three factors in aggravation, any one of which supports a consecutive sentence. (*People v. Davis* (1995) 10 Cal.4th 463, 552.) The trial court declined to impose an upper term sentence but found that the ADW involved a "threat of great bodily harm, high degree of cruelty and callousness. The victim was specifically very vulnerable in [view of] the fact that she was pregnant."

Based on the trial court's findings, the violent nature of the assault, and the vulnerability of the victim who had just been released from the hospital for pregnancy complications, it is inconceivable that the trial court would impose a different sentence if we were to remand for resentencing. (*People v. Champion, supra*, 9 Cal.4th at p. 934.) "Where sentencing error involves the failure to state reasons for making a particular

sentencing choice, including the imposition of consecutive terms, reviewing courts have consistently declined to remand cases where doing so would be an idle act that exalts form over substance because it is not reasonably probable the court would impose a different sentence. [Citations.]" (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889.)

Court Security Fees

The Attorney General argues that the trial court erred in not imposing a mandatory $20 court security fee on each conviction. We agree. (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865.) Former section 1465.8 subdivision (a)(1) requires imposition of a $20 fee on count 1 for misdemeanor battery, a $20 fee on count 2 for dissuading a witness by force or threat of force or violence, and a $20 fee on count 3 for ADW.

Conclusion

We direct the trial court to modify the judgment to impose a $20 court security fee on each of appellant's three convictions (former § 1465.8, subd. (a)(1)) and to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Edward H. Bullard, Judge

Superior Court County of Santa Barbara

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David B. Chatfield, under appointment by the Court of Appeal, for Defendant and Appellant.

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